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In The
Supreme Court of the United States
October Term, 1984

JOHN J. TAVONE,
Petitioner,

vs.

STATE OF RHODE ISLAND,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATE OF RHODE ISLAND
by its attorney
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Now comes the Respondent, the State of Rhode Island, and prays that the Petition for a Writ of Certiorari to the Supreme Court of Rhode Island be denied.

SUMMARY OF ARGUMENT

I. The Rhode Island Supreme Court correctly concluded that the warrant was proper.

II. The Exclusionary Rule must not be applied in this case.

III. Petitioner's conviction does not violate the due process clause.

STATEMENT OF THE CASE

For the purposes of the within Petition, Respondent agrees to the statement of facts set out in the Petitioner's petition.

ARGUMENT

I. The Rhode Island Supreme Court Correctly Concluded That The Warrant Was Proper.

In *Lee Art Theatre v. Virginia,* 392 U.S. 636 (1968), a police officer obtained a warrant based upon the bare con-

clusory allegation that certain films were obscene. This Court, in a brief *per curiam* order, reversed the defendant's conviction with the following observation:

> "[W]e need not decide in this case whether the [magistrate] should have viewed the motion picture before issuing the warrant. The procedure under which the warrant issued solely upon the conclusory assertions of the police officer without any inquiry by the [magistrate] into the factual basis for the officer's conclusions was not a procedure designed to focus searchingly on the question of obscenity," . . . and therefore fell short of constitutional requirements demanding necessary sensitivity to freedom of expression." *Id.* at 637 (citations omitted).

In the instant case Petitioner asks this Court to resolve the question left unanswered in *Lee Art.* The Respondent recognizes that this is an issue that has never been specifically resolved by this Court. Nevertheless, Respondent submits that the courts below properly applied then law which is readily discernible from this Court's opinions in this area. Thus, it is Respondent's view that the within case is simply unworthy of this Court's discretionary certiorari jurisdiction.

In *Miller v. California,* 413 U.S. 15 (1973), this Court reiterated the view that obscene material is not protected by the First Amendment. *Id.* at 23. The *Miller* Court promulgated specific guidelines to be used in determining whether a particular work is legally obscene:

> "The basic guidelines for the trier of the fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically de-

> fined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24.

The Rhode Island General Assembly was fully cognizant of the *Miller* test when it enacted the State obscenity statute. Section 11-31-1 of the Rhode Island General Laws defines obscenity as follows:

> "In determining whether or not a show, motion picture, performance, photograph, book, magazine, or other material is obscene the trier of fact must find
>
> (a) that the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest and
>
> (b) that the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by this chapter and
>
> (c) that the work, taken as a whole, lacks serious literary, artistic, political or scientific value. R.I. Gen. L. (1981 Reenactment) Sec. 11-31-1.

It is noteworthy that Petitioner in this case does not claim that the *Miller* standard was improperly explained to the jury. Nor does he allege that the evidence was insufficient to convict in accordance with the Rhode Island statute. By declining to pursue such arguments, Petitioner essentially concedes that the film seized was obscene. The within Petition accordingly focuses not upon the film itself but upon the warrant issued for its seizure. In this regard Petitioner claims that the Superior Court Justice who issued the warrant lacked sufficient information upon which to find probable cause for seizure of the film. An examination of this Court's decision in this area reveals that Petitioner's claim lacks merit.

In *Roaden v. Kentucky,* 413 U.S. 496 (1973), a county sheriff visited a drive-in theater to view a certain film entitled "Cindy and Donna". The sheriff concluded that the film was obscene. At the conclusion of the showing he arrested the manager of the theater and seized a copy of the film. The defendant's motion to suppress was denied and defendant was convicted. This Court, on a writ of certiorari, concluded that the warrantless seizure of the film violated the Fourth Amendment. The Court noted that the Fourth Amendment protects against unreasonable seizures. *Id.* at 501. In measuring reasonableness, a reviewing court necessarily considers the nature of the materials seized. Books or films are in a special category because their seizure implicates values protected by the First Amendment as well as the Fourth Amendment:

> "[M]aterial seized fell arguably within First Amendment protection, and the taking brought to an abrupt halt an orderly and presumptively legitimate distribution or exhibition. Seizing a film then being exhibited to the general public presents essentially the same restraint on expression as the seizure of all the books in a bookstore. Such precipitate action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards." *Id.* at 504.

On the same day that *Roaden* was decided, this Court issued its opinion in *Heller v. New York,* 413 U.S. 483 (1973). The Court in *Heller* upheld the seizure of an obscene film pursuant to a warrant issued by a magistrate who had visited the theater for the purpose of viewing the film. As with all warrants, the warrant in *Roaden* issued without any adversarial proceedings. This Court saw no reason to require a pre-warrant adversary hearing.

The Court concluded that appropriate post-seizure procedures adequately protect the defendant's rights:

> "If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following the seizure, a prompt judicial determination of the obscenity issue in an adversarial proceeding is available at the request of any interested party, the seizure is constitutionally permissible." *Id.* at 492.

This Court confronted a slightly different problem in *Lo-Ji Sales v. New York,* 442 U.S. 319 (1979). In that case the police delivered to a magistrate two films which had been purchased at an adult book shop. The magistrate viewed the films, concluded that they were obscene, and issued a warrant for additional copies of the same films. The magistrate's role apparently did not end with his signing of the warrant. Police officers invited the magistrate to join them when they executed a warrant in order to make an independent determination regarding other allegedly obscene items on display at the store. What ensued was an all-day visit to the bookstore by the magistrate and the police. The magistrate apparently viewed films and books by the dozens, spending barely seconds in concluding that each item was obscene. At the end of the day the police inventoried the items seized. Despite the fact that the seizure was a *fait accompli,* the police amended the search warrant to include the hundreds of books and films that they had seized.

On these facts, this Court concluded that this highly intrusive search and seizure contravened the Fourth Amendment's proscription against unreasonable searches and seizures. First, the Court reasoned that the warrant as originally drawn was far too general in its scope. The

police in executing the warrant treated it as a general warrant in utter disregard for the Fourth Amendment's particularity requirement. Moreover, this Court found the role of the magistrate to be an absolute abdication of "that neutrality and detachment demanded of a judicial officer when presented with a warrant application for a search and seizure." *Id.* at 326 (citing *Collidge v. New Hampshire,* 403 U.S. 443, 449 (1971)). In commenting upon the magistrate's role in the entire escapade, this Court reasoned in *Lo-Ji,*

> "[T]he objective facts of record manifest an erosion of whatever neutral and detached posture existed at the outset. He allowed himself to become a member, if not the leader, of the search party which was essentially a police operation. Once in the store, he conducted a generalized search under authority of an invalid warrant; he was not acting as a judicial officer but as an adjunct law enforcement officer." 442 U.S. at 327.

Several principles are readily discernible from the foregoing cases. First, a bare conclusory allegation that certain materials are obscene will never provide probable cause for issuance of a warrant. *Lee Art Theatre v. Virginia supra; see Roaden v. Kentucky, supra.* Where the issuing magistrate actually views the film, he may grant a warrant based upon his observations. *Heller v. New York, supra.* On the other hand, any magistrate who undertakes to view the materials in person must strictly limit his involvement at the scene. *Lo-Ji Sales v. New York, supra.*

Viewed against this backdrop, Respondent submits that there was no defect in the warrant issued in the case at bar. The films involved were described in explicit de-

tail by Rhode Island State Police Detective Anthony M. Pesare in his application for a warrant. With regard to the film "Baby Blue" Detective Pesare stated:

> "The plot revolved around two couples and a young girl and her boyfriend. A scene viewed by your affiant took place on the couch of a house. A male and a female were engaged in various sexual activity. The female performed fellatio on the erect penis of the male. The male then performed cunnilingus on the female and the two then engaged in sexual intercourse which culminated in the male withdrawing his penis from the vagina of the female and ejaculating on her stomach."
>
> "In another scene from 'Baby Blue' your affiant observed two females engaged in homosexual activities. The two females performed cunnilingus on each other on a floor near a fireplace. During the scene the two also engaged in mutual masturbation. This activity took place under the watchful eye of a male character in the film."
>
> "Your affiant viewed many other scenes in this picture involving males and females engaged in sexual acts such as intercourse, fellatio, cunnilingus and masturbation." (Petitioner's App. 15-16).

The Rhode Island Supreme Court concluded that this affidavit alleged sufficient probable cause to justify issuance of a warrant. The court relied upon *United States v. Middleton,* 599 F.2d 1349 (5th Cir. 1979), in reasoning that such an affidavit need not describe each and every sexual act in a film in order to establish probable cause:

> "[I]t seems clear that these scenes 'contained successive acts which common sense dictates would require several minutes to perform and thus would consume a substantial portion of the entire film . . .' The af-

> fiant also stated that he reviewed many other scenes showing various explicit sexual acts. Given the relatively short length of the films, we are satisfied that the affidavit provided the magistrate with sufficient understanding of each of the films." *State v. Tavone,* 482 A.2d 693, 698 (R.I. 1984) (citation omitted).

The Respondent submits that the Rhode Island Supreme Court was correct when it concluded that the affidavit supplied probable cause for issuance of the warrant. This Court has recognized the need to distinguish between the quantum of evidence necessary to obtain a warrant and the degree of proof essential to sustain a criminal conviction. A magistrate reviewing a warrant application must apply a standard significantly less stringent than proof beyond a reasonable doubt. As Justice Rehnquist wrote in this Court's opinion in *Illinois v. Gates,* 103 S.Ct. 2317 (1983).

> "Finely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. While an effort to fix some general numerically precise degree of certainty corresponding to 'probable cause' may not be helpful, it is clear that 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.'" *Id.* at 2330 (citations omitted).

The affidavit in this case left little to the imaginaton. It reported no fewer than five sexual acts in explicit detail. The affiant reported that these acts and others were repeated many times in this short film. Petitioner fails to draw this Court's attention to anything of significance or value that was omitted from the affidavit. Given the proper level of detail in the affidavit, Respondent submits that the Rhode Island Supreme Court properly concluded

that it was sufficient. Unless this Court is prepared to adopt a *per se* rule requiring an issuing magistrate to prescreen all allegedly obscene materials, the Petition for certiorari must be denied.

II. The Exclusionary Rule Must Not Be Applied In This Case.

This Court announced the Fourth Amendment exclusionary rule in *Weeks v. United States,* 232 U.S. 383 (1914), and *Mapp v. Ohio,* 367 U.S. 643 (1961). The Court has recently recognized that the philosophical underpinnings of the exclusionary rule sometimes will not support its application to exclude reliable, probative evidence obtained in technical violation of the Fourth Amendment. *Massachusetts v. Sheppard,* 104 S.Ct. 3424 (1984); *United States v. Leon,* 104 S.Ct. 3405 (1984). The principles endorsed in *Sheppard* and *Leon* weigh heavily against application of the exclusionary rule in this case.

In *Leon,* this Court recognized that adherence to the truth-finding role of judges and jurors sometimes requires that the propriety of the exclusionary sanction be measured in light of the magnitude of the alleged police misconduct:

> "Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system." *United States v. Leon,* 104 S.Ct. at 3405 (1984).

In both *Sheppard* and *Leon* this Court held that police officers had reasonably relied upon facially valid warrants. In view of this reasonable reliance, the Court held

that the exclusionary rule could not apply. Respondent submits that a similar approach is proper in this case. A Justice of the Superior Court considered the warrant application to be proper. Later, another Justice agreed and denied the motion to suppress. Moreover, the Rhode Island Supreme Court held that the warrant was adequate. In light of this substantial authority in support of the warrant, the police officer's reliance upon the warrant was clearly proper.

Given the clear evidence that the police acted in good faith, *Sheppard* and *Leon* preclude application of the exclusionary rule. Accordingly, the writ of certiorari must be denied.

III. Petitioner's Conviction Does Not Violate The Due Process Clause.

Petitioner argues that his conviction should have been barred under the Due Process clause. His theory revolves around certain licenses issued by the Town of West Warwick for the general exhibition of films at his theater. These licenses, Petitioner theorizes, constituted an affirmative representation by town officials that he would not be prosecuted for showing obscene films. Based on this theory, Petitioner alleges that the trial judge erroneously refused to dismiss the indictment. Failing this argument, Petitioner alleges that the issuance of the licenses was improperly kept from the jury. This latter contention is nothing less than an attempt to mislead this Honorable Court. An examination of the trial transcript reveals that licenses were admitted as exhibits at pages 105 and 108. Thus, Petitioner's assertion that the licenses were never before the jury is patently false. Moreover, Petitioner's

theory of "reliance" as a basis for dismissal of the indictment is simply wrong.

An examination of the license in issue (Petitioner's App. C) reveals the following language:

> "This license is granted subject to all provisions contained in G.L. 1956 as amended and all Town Ordinances relative thereto." (Pet. App. C).

Thus, from the very face of the license, Petitioner was on notice that he was absolved of none of the provisions of the General Laws.

Petitioner places heavy reliance upon the case of *State v. Berberian,* 427 A.2d 1298 (R.I. 1981). Respondent agrees that *Berberian* is most instructive. In *Berberian* the defendant had applied for and obtained a license for the showing of a specific film. After receiving the license, defendant was prosecuted criminally for showing the very film that city officials had authorized him to show. On these facts, the Rhode Island Supreme Court concluded that the defendant had a reasonable right to rely on the permit issued in that case.

Berberian is clearly distinguishable from the instant case. In this case Petitioner obtained a broad license for the exhibition of films. The license did not refer to any specific film, nor did Petitioner receive any assurance that he could show obscene films without prosecution. Indeed, the license clearly alerted Petitioner that he remained subject to the General Laws of Rhode Island. On this state of affairs Respondent suggests that the conclusion of the Rhode Island Supreme Court was clearly correct:

> "In no way can the town council be said to have affirmatively misled defendant into believing that

through the issuance of a general license the town had given up its right to challenge as obscene films that might be shown at the Palace Theatre." 482 R.I. at 696.

Petitioner's theory is simply erroneous. States grant licenses for myriad activities such as driving, construction, and the practice of law. The recipents of such licenses remain fully subject to the laws of the jurisdiction. For example, a licensed driver who violates the traffic laws is subject to prosecution. He cannot claim that the license confers immunity from prosecution. Yet this is the logical extension of the theory that Petitioner proposes. Respondent submits that the theory is wrong and that the Petition for certiorari must be denied.

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CONCLUSION

For the foregoing reasons the Petition for a writ of certiorari must be denied.

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